Supreme Court, U.S.
FILED
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No.

In the Supreme Court of the United States

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

KANGKIRI CHHUN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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26P

QUESTION PRESENTED

Section 1231(a)(1) of Title 8 of the United States Code provides that when an alien has been ordered removed from the United States, the Attorney General shall remove the alien within 90 days. Section 1231(a)(2) requires the detention during the 90-day removal period of aliens who have been found removable based on a conviction for an aggravated felony. Section 1231(a)(6) then provides, in relevant part, that an alien who is removable for having committed an aggravated felony or "who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3)." 8 U.S.C. 1231(a)(6) (Supp. IV 1998). The question presented is:

Whether the Attorney General is authorized to continue to detain an alien beyond the 90-day removal period under 8 U.S.C. 1231(a)(6) (Supp. IV 1998) if the alien cannot be removed immediately from the country but the Attorney General has determined that the alien would pose a risk of flight or danger to the community if released and the alien's custody is subject to periodic administrative review.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Immigration and Naturalization Service, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The order of the court of appeals (App., *infra*, 1a-2a) is unreported. The opinion of the district court denying habeas relief (App., *infra*, 3a-11a), and the district court's subsequent interim release order (App., *infra*, 12a-14a), issued in light of the court of appeals' decision in *Ma* v. *Reno*, 208 F.3d 815 (2000), are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1231(a) of Title 8 of the United States Code provides in relevant part:

> **Detention and removal of aliens ordered removed**
>
> **(a) Detention, release, and removal of aliens ordered removed**
>
> **(1) Removal period**
>
> **(A) In general**
>
> Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the "removal period").
>
> * * * * *
>
> **(2) Detention**
>
> During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.

(3) Supervision after 90-day period

If the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney General. The regulations shall include provisions requiring the alien—

(A) to appear before an immigration officer periodically for identification;

(B) to submit, if necessary, to a medical and psychiatric examination at the expense of the United States Government;

(C) to give information under oath about the alien's nationality, circumstances, habits, associations, and activities, and other information the Attorney General considers appropriate; and

(D) to obey reasonable written restrictions on the alien's conduct or activities that the Attorney General prescribes for the alien.

* * * * *

(6) Inadmissible or criminal aliens

An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order

> of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

8 U.S.C. 1231(a) (Supp. IV 1998).

STATEMENT

1. a. Respondent is a native and citizen of Cambodia. App., *infra*, 12a. He entered the United States as a refugee on January 25, 1983. Alien file A25374609 (A-file) 59. On July 26, 1985, he adjusted his status to lawful permanent resident. 3/6/00 Post Order Custody Review Worksheet (3/6/00 Review), at 1.

On March 26, 1997, the Immigration and Naturalization Service (INS) served respondent with an order to show cause why he should not be deported under 8 U.S.C. 1251(a)(2)(A)(iii), because he had been convicted of an aggravated felony; under 8 U.S.C. 1251(a)(2)(C) because he had been convicted of using, possessing, or carrying a weapon; and under 8 U.S.C. 1251(a)(2)(A)(i), because he had been convicted of a crime involving moral turpitude. A-file 61. Those charges were based on respondent's conviction in state court on October 5, 1993, of voluntary manslaughter, and his conviction in state court on June 8, 1995, of carrying a concealed firearm. *Id.* at 59. In addition, respondent had been previously convicted in 1991 for carrying a concealed weapon. 3/6/00 Review 2.

Respondent's manslaughter conviction arose out of an incident on May 27, 1993, involving five men, two of whom were identified by an eyewitness as known dealers of methamphetamine. A-file 134. One of the men was shot and killed by another. Two eyewitnesses identified respondent as one of the men involved, but not the shooter. An eyewitness identified respondent as having a gun, however, that he pointed at the victim

and then pointed at the eyewitness when she called to the victim in an attempt to warn him. *Id.* at 135. Respondent and the four other men were charged with murder. The murder charge against respondent was dismissed when he entered a guilty plea to voluntary manslaughter. *Id.* at 131. Respondent was sentenced to seven years' imprisonment, including a one-year sentence enhancement for being armed with a firearm. *Id.* at 127, 131.

Respondent's 1995 conviction arose out of charges that he possessed a controlled substance and was carrying a concealed weapon on his person on December 4, 1992. A-file 146. Respondent failed to appear for a court proceeding in 1993, and a bench warrant issued. *Ibid.* Respondent ultimately was convicted in 1995 and sentenced to two years' imprisonment, to run concurrently with his voluntary manslaughter sentence. *Ibid.*

Respondent was transferred to the custody of the INS on March 20, 1997. 3/6/00 Review 1.

b. On April 23, 1997, an immigration judge found respondent deportable and ordered him removed to Cambodia. A-file 57. The immigration judge noted that respondent had made no application for relief from deportation. *Ibid.* Respondent did not appeal that order to the Board of Immigration Appeals, and thus his removal order became final. App., *infra*, 4a, 12a.

c. On October 25, 1999, the INS requested a travel document for respondent from the consulate of Cambodia. 3/6/00 Review 2. The Cambodian government has not responded to the request, and therefore the INS has been unable to effectuate respondent's removal. *Ibid.* The INS continued to detain respondent under Section 1231(a)(6), subject to periodic administrative reviews of his custody. Most recently, after an interview, the INS determined that respondent is likely to

pose a threat to public safety or property if released because respondent "claimed he liked to carry a gun," will not accept responsibility for his offenses, and downplayed his role in the voluntary manslaughter case (claiming, contrary to eyewitness accounts, that he was in the back seat of a car rather than outside the car pointing a gun at the victim and one of the eyewitnesses). *Id.* at 5. The INS interviewing officer noted that respondent appeared to be evasive and dishonest during the custody review interview. *Ibid.* The INS assistant district director noted that there was an increased possibility for removal to Cambodia. *Id.* at 6.

2. a. Meanwhile, on May 6, 1999, respondent filed a habeas corpus petition in the United States District Court for the District of Nevada, challenging the constitutionality of his continued detention. The district court consolidated respondent's case with six other cases involving continued detention under Section 1231(a)(6).

On January 6, 2000, five judges of the district court entered a joint order in all seven cases denying the petitions for habeas relief. App., *infra*, 3a-11a. The court held that, under *Barrera-Echavarria* v. *Rison*, 44 F.3d 1441 (9th Cir.), cert. denied, 516 U.S. 976 (1995), respondent has no constitutional due process interest in freedom from detention. The court agreed with the decision of the Fifth Circuit in *Zadvydas* v. *Underdown*, 185 F.3d 279 (1999), cert. granted, 121 S. Ct. 297 (2000), that, once a final deportation order is entered against an alien, the alien is in the same position as was the excludable alien in *Barrera-Echavarria*. App., *infra*, 7a-9a. The court also agreed with the *Zadvydas* holding that, after entry of a final order of deportation, "the Government's sovereignty interest to detain and deport aliens, who have committed deportable offenses,

is the same whether the alien's status is resident [like respondent's] or excludable [like the alien in *Barrera-Echavarria*]." *Id.* at 9a. Finding that there was no protected liberty interest, the court examined whether the administrative procedures employed by the INS to review periodically respondent's custody status denied him procedural due process. The court found that the INS's procedures have a rational relationship to a legitimate governmental interest and do not violate due process. *Id.* at 9a-10a.

b. On April 10, 2000, the Ninth Circuit issued its decision in *Ma* v. *Reno*, 208 F.3d 815, holding that the INS lacked authority as a statutory matter under 8 U.S.C. 1231(a)(6) (Supp. IV 1998) to detain an alien beyond the initial 90-day removal period described in 8 U.S.C. 1231(a)(1)(A) (Supp. IV 1998), notwithstanding that the Attorney General had continued to detain the alien because he posed a risk to the community, the alien's detention was subject to periodic administrative review, and the country to which the alien was ordered removed (Cambodia) is engaged in ongoing negotiations with the United States concerning a process for the return of its nationals ordered removed by the INS. The Ninth Circuit in *Ma* did not reach the constitutional grounds on which the district court had relied.

c. On July 28, 2000, the district court entered an order, in light of *Ma*, that respondent be released from detention immediately, pending the final outcome of his appeal. App., *infra*, 12a-14a.

d. On August 14, 2000, the court of appeals entered an order summarily reversing the district court's judgment denying habeas relief and remanding the case for disposition consistent with *Ma*. App., *infra*, 1a-2a.

ARGUMENT

This case presents the question whether the Attorney General is authorized to continue to detain an alien beyond the initial 90-day removal period under 8 U.S.C. 1231(a)(6) (Supp. IV 1998) if the alien cannot be removed immediately from the United States but the Attorney General has determined that the alien would pose a risk of flight or danger to the community if released and the alien's custody is subject to periodic administrative review. The court of appeals summarily vacated the judgment of the district court and remanded the case in light of its holding in *Ma* v. *Reno*, 208 F.3d 815 (2000), that the INS lacks such authority.

On October 10, 2000, this Court granted the petition for a writ of certiorari in *Reno* v. *Ma*, 121 S. Ct. 297, to review that decision of the Ninth Circuit. On the same date, the Court also granted the petition for a writ of certiorari in *Zadvydas* v. *Underdown*, 121 S. Ct. 297, to review a decision of the Fifth Circuit (185 F.3d 279 (1999)) that rejected a constitutional challenge to continued detention under Section 1231(a)(6) without questioning the statutory authority of the Attorney General to detain an alien in such circumstances. Because the question presented in this case is already before the Court in *Ma* and *Zadvydas*, the petition for a writ of certiorari should be held pending the Court's decisions in those cases.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decisions in *Reno* v. *Ma*, No. 00-38, and *Zadvydas* v. *Underdown*, No. 99-7791, and then be disposed of as appropriate in light of the decisions in those cases.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

NOVEMBER 2000

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-15788
DC #CV-99-554-HDM
Nevada (Las Vegas)

KANGKIRI CHHUN, PETITIONER-APPELLANT

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT-APPELLEE

[Filed: Aug. 14, 2000]

ORDER

Before: WALLACE, SCHROEDER and THOMAS,
Circuit Judges

Appellee's motion to hold this appeal in abeyance is denied.

A review of appellee's response to this court's July 20, 2000, order to show cause indicates that the questions raised in this appeal are so insubstantial as not to require further argument. See *Ma* v. *Reno*, 208 F.3d 815 (9th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. ___ (U.S. July 5, 2000) (No. 00-38); *United*

States v. *Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (per curiam).

Accordingly, we summarily reverse the district court's judgment and remand this case for disposition consistent with *Ma* v. *Reno*.

REVERSED AND REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CV-S-99-400-HDM (RLH)
CV-S-99-402-DWH (RLH)
CV-S-99-407-HDM (RLH)
CV-S-99-474-JBR (RLH)
CV-S-99-476-PMP (RLH)
CV-S-99-477-JBR (RLH)
CV-S-99-554-HDM (RLH)

THINH ADRONG, SARA SAMMY VISAMOUNE, ALFREDO ESTRADA, SYNOURN MEACH, CARLOS MEJIAS CARABALLO, OUDONE MOUNSAVENG, AND KANGKIRI CHHUN, PETITIONERS

VS.

IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

[Filed: Jan. 6, 2000]

ORDER

I. Introduction

Petitioners are a lead group selected from more than ninety (90) petitioners for writs of habeas corpus pursuant to 28 U.S.C. § 2241. All seek release from detention of the Immigration and Naturalization Service ("INS"). We determined that all of the petitions pre-

sented common legal issues. The parties briefed these issues, and the matter was submitted after oral argument. We have jurisdiction to consider these petitions. 28 U.S.C. § 2241 (1994); *Magana-Pizano v. INS*, Nos. 97-15678, 97-70384, 1999 WL 1249703, at *5-6 (9th Cir. Dec. 27, 1999).

II. Background

Each lead Petitioner, and all Petitioners but one, have come to the United States from one of four countries: Vietnam, Cambodia, Laos, and Cuba. Some became lawful permanent residents. Others, including Petitioner Carlos Mejias Caraballo, came to the United States as refugees and never adjusted their status to lawful permanent residence. The Petitioners have been ordered removed to their native countries because they were convicted of deportable offenses. The Petitioners did not appeal the orders of deportation to the Board of Immigration Appeals or to the Court of Appeals. Nevertheless, the INS has been unable to remove the Petitioners despite the final order of removal because their countries of origin will not receive them. Petitioners are currently being held in State facilities in this district pending removal. Therefore, Petitioners challenge their continued detention on both procedural and substantive due process grounds.

Before 1996, aliens could not be detained pending deportation more than six months once there was a final order of deportation. Former INA § 242(c), 8 U.S.C. § 1252(c) (1994). In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, 110 Stat. 1214 (enacted on April 24, 1996), and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub.

L. 104-208, 110 Stat. 3009 (enacted on September 30, 1996). The IIRIRA provides for the mandatory detention of criminal aliens during removal proceedings and for ninety (90) days thereafter, during which time removal should generally occur. INA § 241(a)(2), 8 U.S.C. 1231(a)(6) (1999). After the ninety-day period the Attorney General retains discretion to detain the criminal aliens that she determines are "a risk to the community or unlikely to comply with the order of removal." INA § 241(a)(2), 8 U.S.C. § 1231(a)(6) (1999). The Attorney General has delegated this discretionary power for release to the INS District Directors. *See* 8 C.F.R. § 241.4 (1999); 8 C.F.R. § 236.1(d)(2)(ii) (1999). Pursuant to these regulations, and prior to release, the alien must show "by clear and convincing evidence that the release would not pose a danger to the community or a significant flight risk." 8 C.F.R. § 241.4(a).

III. Exhaustion of Administrative Remedies

The INS has several administrative procedures to review an alien's status and to determine whether the alien should be released. An alien can request a review of custody status in writing. 8 C.F.R. § 236.1(d)(2)(ii); 8 C.F.R. § 241.4. The INS has also started to automatically review aliens' custody status according to procedures that the INS has not yet formally promulgated as regulations ("Interim Rules"). *See Chi Thon Ngo v. INS*, 192 F.3d 390, 400-01 (3d Cir. 1999) (Appendix). All lead Petitioners have made written requests for review of their custody.

Courts will not require exhaustion when the administrative body has no power to determine certain issues, such as the constitutionality of a statute or regulation. However, courts will often require exhaustion when the

issues presented are procedural errors that the administrative appeals process can correct, even when the procedural errors might also violate the constitutional guarantee of due process. *See Liu v. Waters*, 55 F.3d 421, 425 (9th Cir. 1995).

Petitioners claim that their continued detention and the custody review procedures violate the guarantees of the Due Process Clause of the Fifth Amendment. The administrative appeals process cannot determine this type of claim, and thus requiring exhaustion of administrative remedies would serve no purpose. *See*, e.g., *Tam v. INS*, 14 F. Supp. 2d 1184, 1189 (E.D. Cal. 1998) (citing *Wang v. Reno*, 81 F.3d 808, 814-15 (9th Cir. 1996)).

IV. Due Process

The Petitioners suggested for the first time at oral argument that three prior Ninth Circuit decisions require the issuance of writs in this case. *Wolck v. Weedin*, 58 F.2d 928 (9th Cir. 1932); *Saksagansky v. Weedin*, 53 F.2d 13 (9th Cir. 1931); *Caranica v. Nagle*, 28 F.2d 955 (9th Cir. 1928). While the court in each of these cases stated that if the immigration authorities could not promptly effect the deportation, the aliens were to be released, the court did not ground its decision on constitutional due process. Instead, the statute that the court relied on contained no authorization for immigration authorities to detain an alien after the entry of a final order of deportation. Former 8 U.S.C. § 156 (1940). Therefore, we conclude that these cases are not controlling on the issues currently before us.

Analysis of whether government action violates the protections of the Due Process Clause of the Fifth

Amendment requires us to determine if the interest that Petitioners propose is a fundamental right or protected liberty interest. *Reno v. Flores*, 507 U.S. 292, 301-02 (1993). Our definition or the proposed interest must be careful and restrained. *Id.* at 302. Here, the proposed interest is the right to be free from immigration detention pending deportation, when the INS cannot effect prompt deportation. If we find that there is a fundamental right or protected liberty interest, then any INS infringements upon that interest must be narrowly tailored to serve a compelling governmental interest. *Id.* If there is no protected liberty interest, then any INS infringements upon that interest must be rationally related to a legitimate governmental interest. *Id.* at 305.

A. Substantive Due Process

In *Barrera-Echavarria v. Rison*, a case involving a Cuban who came to the United States in the Mariel boatlift and who was an excludable alien, the Ninth Circuit concluded that "applicable Supreme Court precedent squarely precludes a conclusion that [excludable aliens] have a constitutional right to be free from detention, even for an extended time." 44 F.3d 1441, 1449 (9th Cir. 1995). The court noted that the case did not involve "the constitutionality of 'indefinite' or 'permanent' detention with no prospect of release", and that "Barrera's case continues to be reviewed at least annually to determine if he meets established criteria for granting parole." *Id.* at 1450. *See also Chi Thon Ngo v. INS*, 192 F.3d 390 (3d Cir. 1999). The holding in *Barrera* is directly applicable to Petitioner Carlos Mejias Caraballo, who was paroled into the United States as a refugee from Cuba and who has never

adjusted his status. He has never been a lawful permanent resident. Therefore he has no protected liberty interest in being free from immigration detention. *Id.* at 1450.

The remaining Petitioners urge us not to extend the holding of *Barrera* to resident aliens as the Fifth Circuit in *Zadvydas v. Underdown*, 185 F.3d 279 (5th Cir. 1999) has done.[1]

In *Zadvydas*, the Court of Appeals for the Fifth Circuit held that there is no constitutional distinction between resident aliens and excludable aliens "when both the right asserted and the governmental interest are identical to those in the parallel case of an excludable alien." 185 F.3d at 295. Zadvydas did not-as the Petitioners in this case do not-challenge the procedure used by the Government in deciding to deport, or the final result. The court held that the interest in freedom from detention asserted by a resident alien who was ordered deported is identical to the right asserted by an excludable alien. *Id.* at 297. With respect to the Government's interest, the court held:

> "In the circumstances presented here, the national interest in effectuating deportation is identical regardless of whether the alien was once resident or excludable. When a former resident alien is—with the adequate and unchallenged procedural due pro-

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[1] These Petitioners also cite *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) for the proposition that once an alien gains entry to the United States, her constitutional status changes such that she is entitled to a fair hearing when threatened with deportation. While true, this is inapposite; no Petitioner here claims that a fair deportation or removal hearing was denied.

> cess to which his assertion of a right to remain in the country entitles him-finally ordered deported, the decision has irrevocably been made to expel him from the national community. Nothing remains but to effectuate this decision. The need to expel such an alien is identical, from a national sovereignty perspective, to the need to remove an excludable alien who has been finally and properly ordered returned to his county of origin." *Id.* at 296.

We agree with the Fifth Circuit that once a final deportation order is entered the Government's sovereignty interest to detain and deport aliens, who have committed deportable offenses, is the same whether the alien's status is resident or excludable. Clearly, the power to exclude aliens is a "fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953). We also agree that the interest in freedom from detention is the same whether an alien is resident or excludable, once that alien has been properly ordered removed. Because *Barrera* holds that excludable aliens have no such right to be free under the Due Process Clause of the Fifth Amendment, we conclude that Petitioners who were resident aliens also have no such right.

B. Procedural Due Process.

There being no protected liberty interest, we examine whether the procedures employed by the INS have a rational relationship to a legitimate governmental interest. *Flores*, 507 U.S. at 305. We find that they do.

It is the duty of the INS to remove Petitioners. Until they can do that, it is also their duty to keep Petitioners from fleeing or endangering the community. Where, as here, an excludable or resident alien has not been deported after ninety days, the Interim Rules provide for the review of the custody status of the alien. *See Chi Thon Ngo*, 193 F.3d at 400-01 (Appendix). These reviews are conducted after notice and afford the alien the opportunity to be assisted by a representative and to present oral and written information at the review in support of release. The alien's criminal record does not create a presumption against release. If the decision is to continue detention, the alien is entitled to receive a written statement of reasons for the decision. Moreover, the INS then reviews the alien's status semi-annually-sooner if requested-by a process to which all lead Petitioners already have availed themselves.[2] *Id.*; *see also* 8 C.F.R. § 241.4.

The Court finds these procedures have a rational relationship to a legitimate government interest and therefore do not offend procedural due process.

V. International Law/Treaties

Petitioners also argue that their continued detention violates international law. It is well settled, however, that a controlling legislative or executive act, or a controlling judicial decision, displaces international law. *Barrera*, 44 F.3d at 1451 (citing *The Paquette Habana*,

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[2] At oral argument, Petitioners' counsel reported anecdotally that he had attended some custody reviews and believed that the District Directors or other officers of the INS were not following the Interim Rules. Even if true, it is not necessarily common to all Petitioners and therefore is outside the embrace of this Order.

175 U.S. 637, 700 (1900). Legislation authorizes the Attorney General to detain Petitioners. 8 U.S.C. § 1231(a)(6). Moreover, *Barrera* is a controlling judicial decision. Therefore, international law has been displaced.

VI. Conclusion

For the foregoing reasons the petitions are denied without prejudice to any subsequent claims that the INS has not followed its own procedures.

Dated this 6th day of January, 2000.

/s/ HOWARD D. MCKIBBEN
HOWARD D. MCKIBBEN
Chief United States District Judge

/s/ PHILIP M. PRO
PHILIP M. PRO
United States District Judge

/s/ DAVID W. HAGEN
DAVID W. HAGEN
United States District Judge

/s/ JOHNNIE B. RAWLINSON
JOHNNIE B. RAWLINSON
United States District Judge

/s/ LLOYD D. GEORGE
LLOYD D. GEORGE
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CV-S-99-0554-HDM
(RLH)

KANGKIRI CHHUN, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT

[Filed: Aug. 4, 2000]

ORDER

Before the Court are Petitioner's Supplemental Points and Authorities, Respondent's "Opposition to Petitioner's Motion for Order Granting Habeas Relief and Immediate Release and Motion to Hold in Abeyance," and Petitioner's "Reply to Respondent's Opposition for Order Granting Habeas Relief and Immediate Release and Motion to Hold in Abeyance, and Petitioner's Request That This Matter Be Given Emergency Consideration." The Court sees no need to wait for Respondent's Reply regarding the Motion to Hold in Abeyance.

Petitioner is a native of Cambodia. Petitioner has established that he entered the United States, that his removal or deportation order became final on April 23, 1997, and that the ninety-day removal period of 8 U.S.C. § 1231 expired on July 22, 1997. *Ma* v. *Reno*, 208 F.3d 815 (9th Cir. 2000), thus applies to Petitioner.

The United States has a repatriation agreement with Cambodia. However, Respondent must still secure the removal of an alien from this country within a reasonable period after the expiration of the removal period. *Ma*, 208 F.3d at 821-22. Petitioner has been in custody for more than two years after the expiration of the removal period. Despite all of the encouraging developments in diplomatic relations with Cambodia, Respondents have never provided even a tentative date for Petitioner's removal from the United States. Continued detention would not be reasonable.

The Court cannot grant the Petition for a Writ of Habeas Corpus. Petitioner is currently appealing the denial of his Petition. *See* Order #23. However, the Court has the ability to grant an interim release order in habeas corpus cases that are on appeal. *See Stein* v. *Wood*, 127 F.3d 1187, 1189 (9th Cir. 1997); see also Fed. R. App. P. 23(b)(3). Given *Ma*, the Court would grant the Petition were this case not on appeal. Therefore, the Court will order Petitioner released pending the final outcome of his appeal, subject to the supervision requirements of 8 U.S.C. § 1231(a)(3).

Respondent's Motion to Hold in Abeyance is without merit. Ma is the final judgment of the Court of Appeals for the Ninth Circuit, and it is binding precedent upon this Court. *Wedbush, Noble, Cooke, Inc.* v. *S.E.C.*, 714

F.2d 923, 924 (9th Cir. 1983). This Court cannot hold this action in abeyance until such time as the Supreme Court grants or denies the Government's petition for a writ of certiorari regarding *Ma. Yong* v. *I.N.S.*, 208 F.3d 1116, 1119-21 (9th Cir. 2000).

IT IS THEREFORE ORDERED that the Motion to Hold in Abeyance is **DENIED.**

IT IS FURTHER ORDERED that Respondent shall release Petitioner from detention immediately, pending the final outcome of his appeal, subject to the supervision requirements of 8 U.S.C. § 1231(a)(3).

DATED this 28th day of July, 2000.

/s/ HOWARD D. McKIBBEN
HOWARD D. MCKIBBEN
Chief United States District Judge

ORIGINAL

FILED
DEC 12 2000
CLERK

No. 00-769

IN THE
SUPREME COURT OF THE UNITED STATES

IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

v.

KANGKIRI CHHUN,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Respondent Kangkiri Chhun, pursuant to Supreme Court Rule 39 and 18 U.S.C. § 3006A(d)(7), asks leave to file his Response by Respondent to Petition for Writ of *Certiorari* to the United States Supreme Court without prepayment of costs, and to proceed *in forma pauperis*.

On June 9, 1999, the Federal Public Defender for the District of Nevada was appointed by the United States District Court for the District of Nevada to represent

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Kangkiri Chhun in the underlying civil case and on appeal to the Ninth Circuit Court of Appeals. This appointment was made pursuant to 18 U.S.C. § 3006A(a)(2)(B). Leave to proceed *in forma pauperis* has not been sought in any other court.

At the time of the appointment, Mr. Chhun had no assets and $57 in a commissary account. Mr. Chhun was detained by the Immigration and Naturalization Service throughout the proceedings in the district court. Since his release on or about August 10, 2000, Mr. Chhun has resided with his parents in Long Beach, California. He continues to be indigent and unable to finance the costs of this opposition to petition for writ of *certiorari*.

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WHEREFORE, the respondent, by and through the undersigned, respectfully prays for leave to proceed in the Supreme Court of the United States *in forma pauperis*.

DATED this 12th day of December, 2000.

Respectfully submitted,

R. L. V FOR

Franny A. Forsman
Federal Public Defender

R. L. V

Rene L. Valladares
Assistant Federal Public Defender
Counsel of Record

R. L. V FOR

Arthur L. Allen
Assistant Federal Public Defender

Federal Public Defender's Office
District of Nevada
330 South Third Street, Suite 700
Las Vegas, Nevada 89101
(702) 388-6577

Attorneys for Respondent Kangkiri Chhun

CERTIFICATE OF SERVICE

No. 00-769

IN THE SUPREME COURT OF THE UNITED STATES

IMMIGRATION AND NATURALIZATION SERVICE,

Petitioners,

v.

KANGKIRI CHHUN,

Respondent.

I, Arthur L. Allen, a member of the Bar of this Court, hereby certify that on this 12th day of December, 2000, three copies of the Response by Respondent to Petition for Writ of *Certiorari* and three copies of Mr. Chhun's Motion for Leave to Proceed *In Forma Pauperis* in the above-entitled case were mailed, first-class postage prepaid, to Seth P. Waxman, Solicitor General of the United States of America, Department of Justice, 950 Pennsylvania Avenue NW, Washington, DC 20530-0001, counsel for Petitioner herein. I further certify that all parties required to be served have been served.

Arthur L. Allen
Assistant Federal Public Defender
330 South Third Street, Suite 700
Las Vegas, Nevada 89101
(702) 383-6577
Counsel for Respondent Kangkiri Chhun

ORIGINAL

Supreme Court, U.S.
FILED
DEC 12 2000

No. 00-769

In The Supreme Court of the United States

October Term, 2000

IMMIGRATION AND NATURALIZATION SERVICE, Petitioner,

v.

KANGKIRI CHHUN, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONSE BY RESPONDENT TO PETITION FOR A WRIT OF *CERTIORARI*

FRANNY A. FORSMAN
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RECEIVED
DEC 14 2000
OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTION PRESENTED FOR REVIEW

Whether, under 8 U.S.C. § 1231(a)(6), the Attorney General has the statutory authority to indefinitely detain a long-time resident alien of the United States beyond the 90-day removal period even if the deportation order cannot be effectuated in the reasonably foreseeable future.

Whether, if the Attorney General has the statutory authority to detain a long-time resident alien of the United States without time limitation under 8 U.S.C. § 1231(a)(6), that provision violates Kangkiri Chhun's Fifth Amendment Due Process rights because his deportation cannot be effectuated in the reasonably foreseeable future and, even if his deportation was foreseeable, he is not a danger to the community or a flight risk.

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IN THE SUPREME COURT OF THE UNITED STATES

No. 00-769

IMMIGRATION AND NATURALIZATION SERVICE, Petitioner,
v.
KANGKIRI CHHUN, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONSE BY RESPONDENT TO PETITION FOR A
WRIT OF *CERTIORARI*

OPINIONS BELOW

The petition for *certiorari* correctly cites to the unreported district court and Court of Appeals opinions below. App. A, B & C to Pet. for Cert. 1a-14a.

STATUTORY, REGULATORY AND CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

The petition for *certiorari* correctly cites the statutory and regulatory provisions involved in the case, 8 U.S.C. § 1231(a)(6), 8 C.F.R. §241.4, and § 1231(a)(3). The additional statutory provision governing Mr. Chhun's release is 8 U.S.C. § 1253(b) which provides:

> An alien who shall willfully fail to comply with regulations or requirements issued pursuant to section 1231(a)(3) of this title or knowingly give false information in response to an inquiry under such section shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

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The constitutional provision involved is the Fifth Amendment Due Process Clause which provides, in relevant part: "No person shall . . . be deprived of life, liberty or property, without due process of law[.]"

STATEMENT

The lower court opinions correctly set forth the facts of the case and the procedural background. Pet. for Cert. 1a-14a.

By writ of habeas corpus, Mr. Chhun challenged on statutory and federal constitutional grounds his ongoing detention by the INS because his deportation order cannot be effectuated in the reasonably foreseeable future, if ever. The District Court denied Mr. Chhun's petition. However, the Court of Appeals remanded Mr. Chhun's writ of habeas corpus to the District Court for reconsideration based upon the circuit's decision in *Ma v. Reno,* 208 F.3d 815 (9th Cir.), *pet. reh'g denied* (June 2, 2000), *cert. granted,* 121 S.Ct. 297, 69 USLW 3086 (U.S. Oct. 10, 2000) (No. 00-38). In light of the grant of *certiorari* in *Ma*, Mr. Chhun waives his right to file a Brief in Opposition. Mr. Chhun does not thereby waive any objections to the government's recitation of the facts which are either inaccurately stated in, or omitted from, the petition for *certiorari.*

ARGUMENT

The questions presented by this case are whether the Attorney General has the statutory authority to detain a long-time resident alien of the United States whose deportation order cannot be effectuated in the reasonably foreseeable future, if ever, and if so, whether that detention runs afoul of Mr. Chhun's substantive due process rights under the Fifth Amendment of the United States Constitution. These same issues are presented in *Ma v. Reno,* 208 F.3d 815, and *Zadvydas v.*

Underdown, 185 F.3d 279 (5th Cir. 1999), *cert. granted*, 121 S.Ct. 297, 69 USLW 324, 69 USLW 3257 (U.S. Oct. 10, 2000) (No. 99-7791), in which the Court granted *certiorari* review on October 10, 2000.

Accordingly, Mr. Chhun does not waive any objections to the government's recitation of the proper legal analysis in Mr. Chhun's case. He nevertheless agrees with the government that consideration of the government's petition in this case should be held pending the Court's decision in *Ma* and *Zadvydas*.

CONCLUSION

The petitioners' petition for *certiorari* should be held pending this Court's decision in *Reno v. Ma*, No. 00-38, and *Zadvydas v. Underdown*, No. 99-7791, and then disposed of as appropriate in light of the decisions in those cases.

Respectfully submitted,

R. L Vmms FOR

Franny A. Forsman
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R. L. Vmms

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Counsel of Record

R. L. Vmms FOR

Arthur L. Allen
Assistant Federal Public Defender

Counsel for Respondent, Kangkiri Chhun

December 12, 2000